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THE POWERS OF A STATE TO PUNISH FOR A NUISANCE DUE TO ACTS IN ANOTHER STATE.

If a factory situated in New Jersey emits poisonous fumes and gases into the state of New York, can the owner thereof be held criminally liable in New York for maintaining a nuisance? Under the laws now in force in the state of New York, he can be held liable only in case his acts also constitute a crime of a corresponding nature in the state of New Jersey.[1]

The necessities of the principal case make manifest the practical disadvantages of this state of the law, for acts committed in one state may have no injurious consequences in that state, and yet may be extremely harmful in their effects within another state. In such a case that state in which the act is performed has slight incentive to punish it, and the other state is powerless

[1] *People of the State of New York v. International Nickel Co.*, N. Y. L. J. Aug. 21, 1914.

to do so. In the protection of its property and citizens, no state should be compelled to depend upon the action of any of its sister states.[2]

The first question met in considering this problem is whether one thus maintaining a nuisance in one state by acts done in another state is punishable under criminal statutes in the usual form referring only to "acts" as crimes. Is it an act in New York to injure property in that state by means of fumes emitted into the air in New Jersey? This question presents in a new form the problem with which courts have struggled for hundreds of years in distinguishing between actions of trespass *vi et armis* and actions on the case, namely, to tell just where an act ends and its consequences begin. It is admitted that a man need not be personally present at a place in order to commit an act there; as where A, standing in Illinois, shoots B in Iowa. Lord Ellenborough has held that firing a gun with shot into a field is a breaking of the close.[3] Though doubts were originally expressed as to whether trespass would lie for the passage of a balloon over land,[4] it has come to be regarded as the better view that trespass *quare clausum fregit* will lie for causing the movement of any solid substance over or into the plaintiff's close if there is any physical contact or any actual injury.[5] While noxious gases may be said to be simply collections of extremely small particles of solid matter carried along on the air, it would seem more accurate to say that in this case there is no movement of any solid substance, for the argument just supposed would apply equally well to air and all gases. It is hard to see any practical distinction between the case where a man pulls a trigger and as a result gases in the gun expand and sent a charge of shot into the plants on another's land, and the case where he kindles a fire in a furnace, as a result of which poisonous fumes move against those same plants and destroy them. To aid in the solution of the practical problem we are now considering, there is a temp-

[2] In applying this principle to the Federal government, Brewer, J., said, "We are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any state." *South Carolina v. United States,* 199 U. S. 437.

[3] *Prewitt v. Clayton,* 5 J. B. Mon. 4.

[4] *Pickering v. Rudd,* 1 Starkie 56.

[5] *Kenyon v. Hart,* 6 B. & S. 252; *Smith v. Smith,* 110 Mass. 302; *Jordan v. Wyatt,* 4 Gratt. 151; *Pollock on Torts,* p. 218.

tation to hold that there is no distinction between these two cases. However, the line must be drawn somewhere, and if the meaning of the word "act" is to be regarded, as it has been developed in the law, it must be held that a man commits an act in the place to which he sends a solid substance, but that he does not commit an act there by sending matter which is not solid.

Admitting, then, that the defendant has committed no act in New York by maintaining his factory in New Jersey, a second problem is presented, namely, is it nevertheless possible for New York to punish the defendant criminally for the effects of his act, by means of a statute which is appropriately worded. As between different counties in the same state, a cause of action has been held to arise where the effects of the act cause injury.[6] In *State v. Lord,* 16 N. H. 357, the defendant erected a dam in Maine which caused water to flow so as to constitute a nuisance on the highway in New Hampshire, and the New Hampshire court sustained an indictment. *State v. Babcock,* 30 N. J. L. 29, where ships had been sunk in a part of the Hudson river which is under the jurisdiction of New York, is squarely contra. Texas has criminally punished parties who, while in other states, have forced papers purporting to affect the title to lands in Texas.[7] North Carolina in early days felt unable to punish the passage in Virginia of counterfeit North Carolina money.[8] The better and more widely adopted rule seems to be that a state may punish a defendant for causing injurious results within its sovereignty by means of his acts committed beyond its boundaries.[9] The sovereignty of each state is supreme within its boundaries, but it is not considered an invasion of that sovereignty for another state to punish a defendant who while personally present

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[6] *Thompson v. Crocker,* 9 Pick. 59; *Company of Proprietors of the Mersey and Irwell Navigation v. Douglas,* 2 East 497. Contra, *In Re Eldred,* 46 Wis. 530.

[7] *Ham v. State,* 4 Tex. Ct. App. 645; *Hanks v. The State,* 13 Tex. App. 289.

[8] *State v. Knight,* 3 N. C. 109.

[9] *Stillman v. White Rock Mfg. Co.,* 3 Woodb. & M. 539; *Commonwealth v. Gaines,* 2 Va. Cases 172; 2 *Wharton on Conf. of Laws, 3d ed.,* pp. 1610, 1626; *Cooley on Const. Lim., 4th ed.,* p. 165; *Story on Conf. of Laws, 4th ed.,* sec. 625b. Contra, *State v. Carter,* 27 N. J. Law 499; *Clark on Crim. Law, 2d ed.,* p. 419; 1 *Bishop on Crim. Law, 5th ed.,* p. 154.

in the first state has committed a criminal act in that other state. Nor is it an invasion of its sovereignty to punish a defendant who while within it commits an extra-territorial crime, such as treason, against another government. The principle here applied is that it is not an invasion of sovereignty for a state to punish a defendant who has injured it while beyond its boundaries. If it is proper, as is universally admitted, to allow the injured state to decide whether the defendant's *act* has been so injurious to it that he should be criminally punished, it should not be considered an invasion of sovereignty for that state to exercise the same discretion in regard to the *effects* of the defendant's act. Any distinction in this connection between the act of a party and the effects of his act is illogical and is harmful in its results. Any distinction here between acts and their effects would seem to have been improperly carried into this branch of the law from the law of pleading; for the sole consideration here is the injury to the state, and the law constitutes that state the judge as to whether the injury has occurred. The fact that the injury is indirect or merely consequential cannot deprive a state of its sovereign right to determine the fact of its occurrence.

In *People v. Merrill,* 2 Park. Crim. 590, two provisions of the United States Constitution are referred to, and it is then asked if there are not constitutional objections to the view which it is here submitted is correct. The sixth amendment guarantees to the accused the right of trial by a jury of the state and district wherein the crime has been committed. Any objection based upon this provision assumes the point at issue, for if it is possible to make the effects of an act a crime, then that crime occurs where the effects of the act take place and the injury is done. The second section of the fourth article guarantees to the citizens of each state all privileges and immunities of citizens in the several states. But if a crime has been committed in one state by the citizen of another, it has been universally held that such citizen has no immunity from punishment if he enters the state where the crime was committed. To adopt a contrary view would be to give him an immunity in the other state not possessed by its own citizens; for it may safely be assumed that no state will make the criminality of the effects of an act dependent on where the act was committed.

It is true that one state has been granted relief against a public nuisance situated in a second state by means of an original

bill in equity filed in the United States Supreme Court,[10] but this relief will be given only when the evil is of "serious magnitude,"[11] and leaves untouched the lesser nuisances against which a complete legal system will enable a state to protect itself.

To attain the proficiency which is possible in a statute defining criminal nuisances, a clause should be introduced which will clearly include the effects within the state of an act performed in another state.

EQUITY JURISDICTION TO ENJOIN CRIMINAL PROCEEDINGS

As a general rule a court of equity will not exercise jurisdiction by way of injunction to stay proceedings in any criminal matters, or in any case not strictly of a civil nature.[1] In most jurisdictions, however, there are well recognized exceptions to this rule. Where a court of equity has jurisdiction first and one of the litigants tries to defeat that jurisdiction by starting a criminal prosecution involving the same parties on account of the same subject matter, the criminal proceedings may be enjoined.[2] But the parties and questions involved must be identical.[3] Probably the most frequent exercise of equity jurisdiction with relation to criminal proceedings is to stay prosecutions under an invalid statute or ordinance where the complainant's property rights are affected.[4] The federal courts have gone so far as

[10] *Georgia v. Tennessee Copper Co.*, 206 U. S. 230.

[11] *Missouri v. Illinois*, 200 U. S. 496.

[1] *Moses v. Mayor*, 52 Ala. 198; *Portis v. Fall et al.*, 34 Ark. 375; *Snouffer & Ford v. Tipton*, 142 N. W. (Iowa) 97; *Kelly v. Conner*, 122 Tenn. 339; High on Injunctions, 4 ed. 33; 2 Story's Equity Jurisprudence, 12 ed. 893; Bispham's Principles of Equity, 424.

[2] *York v. Pilkington*, 2 Atk. 302.

[3] *Paulk v. Mayor*, 104 Ga. 24; *Creighton v. Dahmer*, 70 Miss. 602; *Logan v. Postal Telegraph & Cable Co.*, 157 Fed. 570; *Spink v. Francis*, 19 Fed. 670, 20 Fed. 567; *Saull v. Brown*, L. R. 10 Ch. 64; *Turner v. Turner*, 15 Jur. 218. See also extensive notes in 21 L. R. A. 84; 25 L. R. A. (N. S.) 193.

[4] *Board of Commissioners v. Orr*, 61 So. (Ala.) 920; *Dreyfus v. Boone*, 88 Ark. 353; *Philadelphia Co. v. Dickinson*, 33 App. Cas. (D. C.) 338; *Boyd v. Frankfort*, 117 Ky. 199; *New Orleans, etc., Co. v. New Orleans*, 118 La. 228, 10 Am. & Eng. Ann. Cas. 757; *Clark v. Harford A & B. Ass'n*, 118 Md. 608; *Merchants' Exchange v. Knott*, 212 Mo. 616; *Hall v. Jackson*, 31 How. Pr. 331; *Spaulding v. McNary*, 130 Pac. (Ore.) 391; *Cain v. Daly*, 74 S. C. 480; *Houston v. Richter*, 157 S. W. (Tex.) 189; *Fellows v. Charleston*, 62 W. Va. 665; *Lindsley v. Gas Co.*, 162 Fed. 954.

to enjoin prosecutions in state courts where there was a conflict between state laws and the federal laws or constitution.[5] In some jurisdictions it is sufficient that the complainant is injuriously affected by the enforcement of the invalid statute or ordinance.[6] On this point, O'Brien, J., in a Minnesota case,[7] observed: "But in every case the probable and, we think, direct injury to the property must be shown, entirely distinct from the proceedings to punish personally for the commission of crime. Such cases are considered exceptions to the general rule, and are based upon the theory that it would be inequitable to permit the infliction of irreparable injury pending judicial determination whether or not a crime had been committed, or that from the circumstances involved the property of the one prosecuted cannot be protected by the defense he may interpose to the accusation."

The right of a court of equity to enjoin criminal proceedings upon any ground has been vigorously denied in some courts, regardless of the infirmities of the ordinance or the effects of its enforcement.[8] It is said: "Courts of equity interpose to prevent multiplicity of suits and vexatious litigation by private parties who are shown to be actuated either by desire of gain or to gratify their malice. But prosecutions in the nature of criminal prosecutions are conducted by officers of the state representing the public and looking to the public interests, as well as the just punishment of the guilty, and it would not be proper for a court of equity to undertake to restrain an officer acting in his official capacity and under the responsibilities of his office, from discharging what to him may appear to be a plain duty pertaining to his office."[9] This distinction is not one of very great weight; for if, in a particular case, it can be shown that the elements entitling the interposition of a court of equity exist, whether the proceedings be criminal or civil they should be enjoined. If anything is more vexatious or harassing than civil litigation, it is criminal litigation. The strength of the decisions

[5] *Ex parte Young*, 209 U. S. 123; *Tuchman v. Welch*, 72 Fed. 548.

[6] *Mayor v. Radecke*, 49 Md. 217; *Clarke v. Harford A. & B. Ass'n, supra; Bluefield v. Bluefield*, 70 S. E. (W. Va.) 772; *City v. Gas Co.*, 132 Ind. 575.

[7] *Cobb v. French*, 111 Minn. 429, 432.

[8] *Moses v. Mayor, supra; Poyer v. Village*, 123 Ill. 111; *Creighton v. Dahmer, supra.*

[9] *Railway Co. v. Dist. of Col.*, 6 Mackey 570.

in many of the cases refusing recognition of the exception to the general rule is lessened by the adoption of the principle that "to entitle a party to maintain a bill on this ground (to prevent a multiplicity of suits) there must be a right claimed affecting many persons."

The greatest departure, perhaps, from the general rule set forth above obtains in Kentucky. Not only is a multiplicity of prosecutions alone sufficient to sustain equity jurisdiction to restrain criminal proceedings,[10] but it is sufficient that there was a misapplication of a valid statute, provided there was no appeal from the judgment rendered. The point arose in the recent case of *Zweigart v. Chesapeake & Ohio R. R. Co.*[11] Plaintiff, having been fined under a statute providing that "any person who shall put any obstruction in a passway—shall be liable to a fine of ten dollars, recoverable by warrant in the name of the commonwealth, the fine to be laid out in repairing the passway, . . ." for obstructing with its cars a passway of the defendant over its right of way, and alleging the issuance of the warrants and the fact that the defendant, unless restrained by order of court, would cause numerous other warrants to issue against defendant, and that such proceedings constituted a cloud on plaintiff's title, and would seriously interfere with its right to use and control its property, and that there was no appeal from any judgment that might be rendered against it under the warrants that issued, or which the defendant was threatening to issue, brought an action to enjoin the defendant from further prosecuting the warrants, and for the purpose of quieting its title to its right of way. In affirming a decree granting the relief asked, under the authority of *Shinkle v. Covington*,[12] the Court af Appeals said: "While ordinarily, of course, an injunction will not lie to restrain criminal proceedings, yet where, as in this case, plaintiff's property right is involved, and it appears that there will be a multiplicity of suits, and irreparable injury will follow unless the prosecution be enjoined, we conclude that a court of equity may properly interfere.—And where the facts are sufficient to justify the interference of a court of equity, the court will pass on all the questions that are necessarily involved. It is a case of conflicting easements. The easement of defend-

[10] *South Covington, etc., Co. v. Berry*, 15 L. R. A. (Ky.) 604.
[11] 170 S. W. (Ky.) 1194.
[12] 83 Ky. 420.

ant is subordinate to that of plaintiff. Whatever obstruction exists grows out of plaintiff's exercise of its corporate franchise.—Furthermore, the statute refers to "any obstructions," and not to an obstruction maintained for an unreasonable length of time.—It seems to us, therefore, that the statute does not apply to such an obstruction." The case is distinguished from the earlier case relied upon by the court in that a temporary injunction was granted there, pending the establishment of the rights of the respective parties in a court of law, whereas in the principal case the court of equity determined the conflict of property rights which gave rise to the criminal proceedings, quieted title in the plaintiff, and perpetually enjoined further proceedings of the same nature.

It appears from a number of cases, an eminent authority to the contrary notwithstanding,[18] that the prevention of multiplicity of suits is in itself sufficient ground for equity jurisdiction where the relief asked is preventive in character and where all the issues involved may be determined by the solution of one or more questions of law; and provided also that consolidation is not available at law, and adequate. Under all the circumstances jurisdiction was no doubt properly exercised in the principal case, although it can hardly be said to be the function of a court of equity to act as an appellate court of law. Nevertheless, when the occasion arises, as it did here, requiring relief from a fault in the adjective law of the jurisdiction, there is no reason why a court of equity should not grant it.

LAST CLEAR CHANCE—KNOWLEDGE OF PLAINTIFF'S DANGER.

In a recent case[1] it was held that the defendant under the doctrine of last clear chance is not liable unless he discovered the plaintiff's danger in time to avoid injuring him by the exercise of ordinary care. This seems to be a decision making the liability of the defendant depend upon his actual knowledge of the plaintiff's danger and not upon the fact that he was in a position to have such knowledge by exercising ordinary prudence and care.

[18] 1 Pomeroy's Equity Jurisprudence, 365, 366.

[1] *Townsend v. Butterfield,* 143 Pac. (Cal.) 760.

The early cases[2] held, that if the plaintiff was guilty of any negligence which contributed to his injury he could not recover and it was not until the case of *Davies v. Mann*[3] that the doctrine of last clear chance was applied.

There are two theories of the doctrine, depending upon the view different courts take of proximate cause. The first, and the more general, is that the negligence of the plaintiff, which would have been clearly contributory, has been rendered remote by the intervention of a later chance, solely in the defendant, to avoid the natural and proximate result of the plaintiff's negligence, and the failure to exercise this last chance becomes the sole proximate cause of the injury.[4] Here, proximate cause is looked upon as the last, or final, cause of the injury. This view would seem to reduce the doctrine to a case of negligence in which the defendant, in law, is solely negligent.

The other view is the logical result of a broader definition of proximate cause. A definition which permits "that it need not be the nearest cause in time or place to the effect it produces."[5] Under this doctrine it is clearly an exception to the rule of contributory negligence. The plaintiff's negligence is admitted to be a proximate cause of the injury but the defendant is not allowed to set it up as a defense because, on account of his position, notwithstanding the contributory negligence of the plaintiff, he alone had a chance to avoid the injury when the danger was imminent.[6]

Under both of these views the last clear chance necessarily implies a point of time beyond which it lies wholly within the power of only one party to avoid the accident. During this period, in order for the plaintiff to recover, the defendant must have the sole power to avoid the danger by exercising reasonable care, and he alone must be regarded as negligent during this

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[2] *Butterfield v. Forrester,* 11 East. 60; *Lack v. Steward,* 4 C. & P. 106; *Luxford v. Large,* 5 C. & P. 421.

[3] 10 M. & W. 546.

[4] *Southern Ind. Ry. Co. v. Fine,* 163 Ind. 617, 72 N. E. 589; *Loyd v. Albermale, etc., R. R. Co.,* 118 N. C. 1010, 24 S. E. 805; *Nehring, etc. v. Conn. Co.,* 86 Conn. 109, 84 Atl. 301; *Fuller v. I. C. R. R. Co.,* 65 So. (Ala.) 783; *Indianapolis Traction & Terminal Co. v. Croly,* 96 N. E. (Ind.) 973; *Herrick v. Washington Water Power Co.,* 134 Pac. (Wash.) 934.

[5] 29 Cyc. 328 (c).

[6] *Inland etc. Co. v. Tolson,* 139 U. S. 551, p. 558; *Hutchinson v. St. Louis Ry. Co.,* 88 Mo. App. 376; *St. Louis Southwestern Ry. Co. v. Cochran,* 91 S. W. (Ark.) 747.

period.[7] The plaintiff, although negligent in creating the danger, must during this period be powerless to avoid it and therefore all negligence on his part must necessarily have terminated. If the power to avert the danger existed in both until the same instant, and in neither afterward, contributory negligence would be, with one exception,[8] a good defense.[9]

If during this period of last chance the defendant had actual knowledge of the plaintiff's danger and failed to exercise ordinary care to avoid it, all courts would agree in giving relief to the plaintiff. Beyond this, however, the courts are in conflict. One line of authorities requires actual knowledge,[10] and another requires merely such an opportunity to have actual knowledge that a reasonably prudent man would have had it.[11]

No authorities need be cited for the proposition that in a case of negligence, where the plaintiff in no way contributes to the injury, the defendant is bound to know what a reasonably prudent man in his position would have known. Is there any good reason for a different rule in the case of the last clear chance? As indicated above, where the doctrine is applied, the defendant must have been the only party really negligent, during the period immediately preceding the injury. During this period the defendant is in a position, and has the potential power, to avoid the injury, as a matter of fact, whether he is conscious of the plaintiff's danger or not. Is the circumstance that the plaintiff's negligence contributed to create the danger a sufficient reason for relaxing the usual rule of responsibility applicable to the defendant?

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[7] *Indianapolis Traction & Terminal Co. v. Croly,* 96 N. E. (Ind.) 973; *Roanoke Ry. & Electric Co. v. Carroll,* 72 S. E. (Va.) 125.

[8] *Evansville & S. I. Traction Co. v. Johnson,* 97 N. E. (Ind.) 176; *Herrick v. Washington Water Power Co., supra.*

[9] *Indianapolis Traction & Terminal Co. v. Croly,* 96 N. E. (Ind.) 973; *Denver City Tramway Co. v. Cobb,* 164 Fed. 41; *Mellzner v. Northern Pac. Ry. Co.,* 46 Mont. 162, 127 Pac. 146.

[10] *Waterman v. Visalia Electric Ry. Co.,* 137 Pac. (Cal.) 1096; *Iowa Cent. Ry. Co. et al. v. Walker,* 203 Fed. 685; *St. Louis Southwestern Ry. Co. v. Cochran,* 77 Ark. 398, 91 S. W. 747; *Wolf v. Chicago Great Western Ry. Co.,* 147 N. W. (Iowa) 901; *Zitnik v. Union Pac. Ry. Co.,* 136 N. W. (Neb.) 995.

[11] *Guenther v. St. Louis, I. M. & S. Ry. Co.,* 108 Mo. 18, 18 S. W. 846; *Morris v. Seattle R. & S. Ry. Co.,* 66 Wash. 691, 120 Pac. 534; *Rush v. Metropolitan St. Ry. Co.,* 137 S. W. (Mo.) 1029; *Roy v. Aberdeen R. R. Co.,* 141 N. C. 84, 53 S. E. 622; *Kinney v. St. Louis & S. R. R. Co.,* 133 Pac. (Okla.) 180.

The reason for any liability on account of negligence is based upon public policy, which requires that life and property be protected from the careless acts of third persons. By requiring actual knowledge in the defendant of the plaintiff's danger as a condition precedent to the applicability of the last clear chance rule, the courts are in effect saying that more accidents will be avoided, and therefore life and property better protected, by not creating the duty to discover and avoid the peril of persons who have negligently exposed themselves to danger, than by affording a slightly greater protection to such persons and in a measure encouraging their negligence.

Probably the negligence of the plaintiff himself would not be sufficiently discouraged unless a rule is adopted holding the defendant liable only when he reasonably should from his position have had knowledge of the plaintiff's danger, and then only in case he failed to exercise reasonable, and not extraordinary, care to avoid the injury. The courts are in conflict on these questions, but the principal case would seem to be in accord with the weight of authority.

IS CONSIDERATION NECESSARY TO MAKE A BINDING WAIVER OF A RIGHT UNDER A CONTRACT?

In a case recently decided in the state of Washington[1] the plaintiff set forth in her declaration a custom on the part of the defendant company to give their employees passes over the lines of the company, that this custom was called to her attention when she applied for employment, no mention being made of any exemption of the defendant from liability for its negligence or that of its servants and that the giving by defendant of this pass constituted a portion of the consideration for her services. She also averred that she worked for the defendant for a time and then applied for a pass, and was compelled to sign a printed request which read, "I hereby request that you deliver to me a pass whereby I will be enabled to travel on your cars without the payment of fare. I expressly agree, understand and acknowledge that the delivery of such a pass is and will be a pure gratuity on your part and supported by no consideration whatever and that in accepting said pass I assume the risk of every injury

[1] *Hageman v. Puget Sound Electric Ry.*, 141 Pac. (Wash.) 1027.

to person and property sustained by me howsoever caused while riding upon cars controlled, owned or operated by you." The pass which was issued and signed by plaintiff contained virtually the same conditions; setting forth that it was "free," "a pure gratuity," and "for no consideration whatever." The complaint concluded with an allegation of the defendant's negligence and the resulting injury to the plaintiff. To this complaint there was a demurrer and the majority of the court held that the demurrer was good on the ground that the exemption of a common carrier from liability by a gratuitous passenger is not against public policy and that the plaintiff was a gratuitous passenger because the signing of the application for a pass was a clear waiver of her prior contract. Three members of the court dissent on the ground that the plaintiff had, under the contract, earned a right to transportation; that the attempted waiver was without consideration and therefore the plaintiff was a passenger for hire and her assumption of risk contrary to public policy.

If the plaintiff in the principal case was a gratuitous passenger the decision is clearly in accord with the authorities.[2] But if she was at the time of the negligence complained of a passenger for hire the decision should have been different. The soundness of the line of argument which seeks to justify the conclusion that the signed application for the pass and the pass itself constituted a valid waiver of the prior contract right is, it is submitted, open to question.

It is clear that to justify this holding that the plaintiff was a free passenger the original contract must be gotten rid of. For by that contract, as averred, the plaintiff gave her services in return for the pass, and the giving of services is sufficient consideration to make one a passenger for hire—as good as the giving of money.[3] So the plaintiff had at one time the right to become a passenger for hire without paying the ordinary fare. She could not lose it merely by calling herself a free passenger, as was held in the case of one travelling on a so-called "drover's pass" and in other similar cases, for the court will look behind the words and not allow one who really is a

[2] *Griswold v. N. Y. & N. E. R. Co.*, 53 Conn. 371; *Quimby v. B. & M. R. Co.*, 150 Mass. 365; *Perkins v. N. Y. C. R. Co.*, 24 N. Y. 196; *Annas v. Milwaukee & N. W. R. Co.*, 67 Wis. 46; *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Hall v. N. E. R. Co.*, L. R. 8 Q. B. 437.

[3] *Doyle v. Fitchburg R. R.*, 166 Mass. 492; *Peterson v. Seattle Traction Co.*, 23 Wash. 615.

passenger for hire to exempt the carriers merely by saying he is a free passenger.[4] The majority of the court in the principal case hold that the plaintiff changed her status by a waiver of her contract right while the minority say that there was no waiver. When the court speaks of the "waiver" given by the plaintiff they must be taken to mean that the agreement to accept a free pass was a rescission of the prior contract. But such an agreement requires on principle the same elements of mutual consent, intention and consideration which are required to form any valid contract.[5] In the principal case the intention of the plaintiff to abandon her contract right may easily be implied. She could not use two passes and can reasonably be supposed to have taken the free pass in full satisfaction of her rights to transportation. She did an act inconsistent with an intention to hold the defendant strictly to the terms of the contract. But there at once arises the question whether the intended agreement of the plaintiff was based upon any consideration. Consideration is defined by Anson as "something done, forborne, or suffered, or promised to be done, forborne or suffered by the promisee in respect to the promise."[6] The defendant Company here did not in any way change its position so as to bring itself within this definition—it did nothing it was not already bound to do.

But the court seems to be under the impression that no consideration was needed to support the plaintiff's so-called "waiver." All the cases, English and American, are agreed that consideration is necessary to support the discharge of a bilateral contract and this consideration is usually found in the mutual promises to release.[7] In the case of a unilateral contract there are a few English cases which make a distinction between an agreement to discharge made before breach and one made after breach. The release of the primary, contractual right would not require consideration according to this distinction, but the release of the secondary remedial right would.[8] There are cer-

[4] *N. Y. C. R. Co. v. Lockwood,* 17 Wall. 357; *Doyle v. Fitchburg R. R. Co., supra.; Pa. R. Co. v. Henderson,* 51 Pa. 315.

[5] Williston's Ed. Wald's Pollock on Contracts, p. 815.

[6] Anson on Contracts, 2d Am. Ed., p. 100.

[7] Williston's Ed. Wald's Pollock on Contracts, p. 815; *Farrar v. Toliver,* 88 Ill. 408; *King v. Gillett,* 7 M. & W. 55; *Saeger v. Runk,* 148 Pa. St. 77; *Spier v. Hyde,* 78 App. Div. 151; *Anson on Contracts,* 2 Am. Ed., p. 339; Clark on Contracts, pp. 608-609; also a dictum of Baron Parke in *Foster v. Dawber,* 6 Exch. 838.

[8] *Edwards v. Weeks,* 2 Mod. Rep. 259.

tainly two early English cases decided in 1634 and 1588 which hold that a plea of exoneration before breach was good without any consideration.[9] Williston, relying on statements made *obiter* in *Edwards v. Walters*[10] and *Dobson v. Espie*[11] says that the English law still is that discharge before breach of a unilateral contract may be made without consideration. Anson reaches the opposite conclusion on the strength of a dictum of Baron Parke in *Foster v. Dawber*.[12] Clark in his work on Contracts agrees with Anson. Williston however admits that there is "an absence of any underlying principle to support the English doctrine."[13] When the American authorities are considered, however, it is found that they nearly all agree on the proposition that consideration is necessary to support the discharge of a unilateral contract before breach.[14] These cases all hold that unless there is consideration for the agreement to discharge it is a mere *nudum pactum*. A few American cases have tended the other way, but they fail to justify their holdings by any cogent reasoning.[15]

The principal case is analogous to the authorities cited. It is an attempt by an obligee to do away with the obligation and correlative right by an agreement without any consideration. The want of consideration should have been held a fatal defect in the defendant's plea of a waiver of the contract right. That is the conclusion reached by all the American cases at least, but the court in the principal case overlooks the whole matter of the necessity of consideration. For this reason the opinion of the minority seems to be better law, on reason and on precedent. For since there was no valid waiver the defendant was under an obligation to accept the plaintiff as a passenger for hire, and so when she became a passenger she could not, by merely calling herself a gratuitous passenger, contract away her rights against the defendant as a common carrier.

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[9] *Langden v. Stokes*, Croke's Reports (Charles) 383; Conier's & Holland's Case, 2 Leon. 214.

[10] 1896, 2 Ch. 157.

[11] 2 H. & N. 79.

[12] 6 Exch. 838.

[13] Williston's Ed. Wald's Pollocks on Contracts, p. 819.

[14] *Allison et al. v. Abendroth*, 108 N. Y. 470; *Crawford v. Millspaugh*, 13 Johns. 87; *Saeger v. Runk*, 148 Pa. St. 77; *Bayley v. Buzzell*, 1 Appleton (Me.) 88; *Lockwood v. Crawford*, 18 Conn. 360.

[15] *Robinson v. Wurtz v. McFaul*, 19 Mo. 549; *Kelby v. Bliss*, 54 Wis. 187; *Hathaway v. Lynn*, 175 Wis. 186.

EXTENT TO WHICH A CONTRACT OF INSURANCE WITH A MUTUAL BENEFIT SOCIETY CAN BE VARIED BY SUBSEQUENT CHANGES IN BY-LAWS.

In an action to recover premiums on mutual benefit life insurance policies in which the right to amend the by-laws of the society was reserved and which premiums were declared forfeited for the refusal to pay increased rates assessed after the contract of insurance was made, it was recently held that where the rates charged are so low that insolvency threatens the society's existence, a by-law increasing the rates no higher than required to carry the risks on an adequate and equitable basis is not unreasonable and therefore not a breach of the contract.

The power of a Mutual Benefit Society to make retroactive changes in its by-laws concerning its contracts of insurance is uncertain. The courts are in fair agreement, as was assumed in the principal case, that if the power is expressly reserved in the contract, reasonable amendments may be made.[1] Unless the contrary intention is clearly expressed, however, by-laws are construed to operate prospectively only.[2] Of course, if the power has not been reserved, a subsequent change in the contract cannot be made without consent.[3] But there seems to be no more definite criterion than reasonableness and in applying this test the courts are often directly opposed in their conclusions. Mere administrative changes in the by-laws, such as time, place or manner of paying the premiums, may be upheld without injustice.[4] But a by-law limiting the time in which to file claims and giving the society ninety days in which to adjust final benefits was held not to limit the time for bringing suit on a policy issued previous to the adoption of the by-law.[5] The great conflict is concerning subsequent amendments varying the nature of the risk or the amount of the premiums or policy. It has been

[1] *Gilmore v. Knights of Columbus,* 77 Conn. 58; *Caldwell v. Grand Lodge of United Workmen of California,* 148 Cal. 195; *Ross v. Modern Brotherhood of America,* 120 Iowa 692; *Lange v. Royal Highlanders,* 75 Neb. 188.

[2] *Modern Woodmen of America v. Wieland,* 109 Ill. App. 340.

[3] *Nat. Council of Knights and Ladies of Security v. Dillon,* 212 Ill. 320; *Fargo v. Supreme Tent,* 96 (N. Y.) App. Div. 491, and cases there cited.

[4] *Messer v. Ancient Order of United Workmen,* 180 Mass. 321.

[5] *Cohen v. Supreme Sitting of Order of Iron Hall,* 105 Mich. 283.

held that a by-law excluding saloon-keepers from membership applied to those who then were as well as to those who should become saloon-keepers.[6] But a similar provision regarding car-couplers was held not to be valid.[7] A subsequent amendment excepting suicide from the insured risks was held to prevent a beneficiary from suing on the policy in such event.[8] But the same amendment was held not to prevent the beneficiary from suing in Tennessee.[9] In like manner a by-law excepting suicide while insane passed subsequent to the issuance of a policy has been held not to apply.[10] In another case, however, the same amendment barred a recovery.[11] Suicide, while sane, bars a recovery anyway on the ground that it is a breach of the implied promise that the insured will do nothing to hasten the maturity of the policy.[12] In the same way, it has been held that a benevolent association can not reduce the amount of sick benefits by an amendment passed after the sickness has occurred.[13] Yet, in another jurisdiction the society has been allowed to limit the number of weeks of such allowance after the disability occurred.[14] Again, a mere general consent that the by-laws may be amended has been held not to authorize a higher rate of assessment for the reason that it would interfere with a member's vested right.[15] On the other hand, Illinois holds that a member has no vested right to insurance at a former lower rate where he has previously given general consent to changes in the by-laws.[16] The authorities being thus conflicting it is permissible to consider what rule should be adopted on principle in such cases. According to the express terms of the contract, any subsequent amendment is assented to in advance, but for reasons of justice and policy the courts have always considered the member to have some vested rights. These are, to have as near as may be what he sought to get and for which he

[6] *Ellerbe v. Faust,* 119 Mo. 653.
[7] *Hobbs v. Iowa Mut. Ben. Ass'n.,* 82 Iowa 107.
[8] *N. W. Ben. and Mut. Aid Ass'n. v. Warner,* 24 Ill. App. 357.
[9] *Supreme Lodge K. P. v. La Malta,* 95 Tenn. 157.
[10] *Shipman v. Protected Home Circle,* 174 N. Y. 398.
[11] *Sovereign Camp of the Woodmen of the World v. Fraley,* 94 Tex. 200.
[12] *Burt v. Union Central Life Ins. Co.,* 187 U. S. 362.
[13] *Boultney v. Bachman,* 62 How. Prac. (N. Y.) 466.
[14] *Stohr v. San Francisco Musical Fund Society,* 82 Cal. 557.
[15] *Strauss v. Mut. Reserve Fund Life Ass'n.,* 128 N. C. 465.
[16] *Fullenwider v. Supreme Council Royal League,* 180 Ill. 621.

paid his money. Mere administrative changes do not prevent this, but amendments which would deprive him altogether of insurance, such as adding his occupation or manner of death to the uninsured risks, are not to be upheld. An increase in the premium or a decrease in the amount of the benefit being part forfeitures and deprivation of the very thing sought for, and going to the essence of the contract should not be allowed except where otherwise a complete failure of insurance is evident, or where insolvency threatens. The reason for the exception is the same as for the rule, namely, to preserve the insured's investment and provision for those dependent on him, as far as may be, in accordance with the original intention of the parties. The principal case seems correct as illustrating the exception.[17]

[17] See also *Reynolds v. Supreme Council Royal Arcanum,* 192 Mass. 150.